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UNCLAS SECTION 01 OF 02 HANOI 000221

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E.O. 12958: N/A

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SUBJECT: VIETNAM: TOWARDS A LEVEL PLAYING FIELD FOR INVESTORS

¶1. SUMMARY: In late December 2003, Vietnam's Ministry of Planning and Investment (MPI) held a workshop to gather comments and ideas from a wide-range of participants regarding the harmonization of the legal systems on investment. MPI plans to submit to the National Assembly a proposal for a common legal framework for both domestic and foreign investment under its 2004-2005 law-making program. The GVN is attempting to create a common legal framework for the business activities of all economic sectors in order to increase its competitiveness and meet its international commitments as well as World Trade Organization (WTO) requirements. END SUMMARY.

¶2. During a December workshop at MPI, which Econoff attended, representatives from foreign and local businesses, foreign consulting agencies, local think tanks, and law-making agencies discussed the need for Vietnam to create a common legal framework for business activities in all economic sectors. They described how Vietnam currently has different legal systems governing the business activities of various types of enterprises depending upon their investment/ownership.

¶3. Participants outlined Vietnam's current complex investment system. With a Law on Foreign Investment (LFI), Law on Domestic Investment Promotion (LDIP), and Enterprise Law, legal requirements differ in matters such as the form of investment, establishment procedure, and organizational structure. For example, the Enterprise Law, which governs the establishment of domestic companies, allows domestic investors to create a business in numerous forms, including a limited liability company, joint stock firm, partnership, and holding company. However, the LFI, which covers both the formation of foreign invested enterprises (FIEs) and promotion of FDI, only permits a foreign investor to set up a limited liability company. In addition, while local companies follow a registration regime for establishing a business, a foreign invested enterprise is subject to appraisal and licensing procedures. (Note: In order to fulfill its commitments in the U.S.-Vietnam Bilateral Trade Agreement (BTA), Vietnam is required to move toward an investment registration system for U.S. investments. End Note.)

¶4. During the discussion at the workshop, several divergent ideas regarding the future of Vietnam's investment regime emerged. Several speakers suggested that Vietnam could integrate the investment promotion portion of the LFI with the LDIP thus creating one investment promotion law while retaining one or more separate laws to govern other matters (i.e. either adapt the Enterprise Law to cover FIEs or separately maintain the Enterprise Law and portions of the LFI). A representative from the MPI-affiliated think tank, Central Institute for Economic Management (CIEM), recommended the alternative of harmonizing some legal requirements and legislation, including those regarding the form of permitted investment, establishment and dissolution procedures, and permitted (or prohibited) investment sectors. Vietnam's final option, which many participants advocated, would be to incorporate all features of the three laws into one new "super" law.

¶5. Arguing against the idea of a "super" law, a representative from MPI, the main Government agency responsible for drafting legislation on investment, explained that since the LFI is aimed at attracting FDI, the legal framework governing FIEs must include certain requirements. For example, although there is no requirement regarding domestic capital, the GVN mandates a minimum level of foreign capital. In addition, the GVN has said that it may need to maintain lists of economic sectors where foreign investment is encouraged, limited, or prohibited. At the same time, MPI recognized that those sectors must be logically selected and transparently publicized.

¶6. An official from MPI subsequently acknowledged during the seminar that both the current legal system and its enforcement has tended towards protectionism, inconsistency,

discrimination, and lacking a strategic view. He also stated that in order to create an equal, non-discriminatory business environment in Vietnam and meet its international commitments and WTO requirements, the GVN must make the legal framework governing investment reasonable, consistent, and equivalent to common business standards and practices. Towards this end, the MPI representative said that MPI intends to submit new investment legislation to the National Assembly under the 2004-2005 law-making program.

17. COMMENT: In recent months, the GVN, businesses, and donors have increasingly discussed the need to harmonize Vietnam's investment regimes. Although it appears that significant debate remains regarding the shape of future legislation, the consensus on the need for change is a welcome development. The USG, along with many enterprises and consultants, will continue to press the GVN to resolve its internal debate and undertake the necessary changes as soon as possible in order to create a level playing field and ensure that Vietnam meets its international commitments, including under the BTA.

BURGHARDT